

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

JEANA CORK,

Plaintiff,

V.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. ED CV 09-2288-PLA

MEMORANDUM OPINION AND ORDER

1.

PROCEEDINGS

Plaintiff filed this action on December 17, 2009, seeking review of the Commissioner's denial of her applications for Disability Insurance Benefits and Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on January 5, 2010, and January 19, 2010. Pursuant to the Court's order, the parties filed a Joint Stipulation on August 11, 2010, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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1 II.

2 **BACKGROUND**

3 Plaintiff was born on January 1, 1966. [Administrative Record (“AR”) at 65, 67, 120.] She
4 has some college education [AR at 28-29], and has past relevant work experience as a mental
5 health nurse and a provider of in-home support services. [AR at 22-25.]

6 On July 10, 2006, plaintiff protectively filed her applications, alleging that she has been
7 unable to work since May 15, 2005, due to, among other things, “disorders of [the] back
8 (discogenic & degenerative).” [See AR at 64, 65, 67, 120, 127.] After her applications were
9 denied initially and on reconsideration, plaintiff requested a hearing before an Administrative Law
10 Judge (“ALJ”). [AR at 69-74, 78-82, 86.] A hearing was held on November 19, 2008, at which
11 time plaintiff appeared with counsel and testified on her own behalf. [See AR at 19-63.] Plaintiff’s
12 husband and a vocational expert also testified. [AR at 54-61.] On April 8, 2009, the ALJ issued
13 an unfavorable decision. [See AR at 6-18.] When the Appeals Council denied plaintiff’s request
14 for review of the hearing decision on October 6, 2009, the ALJ’s decision became the final
15 decision of the Commissioner. [AR at 1-3.] This action followed.

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17 III.

18 **STANDARD OF REVIEW**

19 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s
20 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial
21 evidence or if it is based upon the application of improper legal standards. Moncada v. Chater,
22 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

23 In this context, the term “substantial evidence” means “more than a mere scintilla but less
24 than a preponderance -- it is such relevant evidence that a reasonable mind might accept as
25 adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at
26 1257. When determining whether substantial evidence exists to support the Commissioner’s
27 decision, the Court examines the administrative record as a whole, considering adverse as well
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as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala, 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

IV.

EVALUATION OF DISABILITY

Persons are “disabled” for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted or is expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

A. THE FIVE-STEP EVALUATION PROCESS

The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a “severe” impairment or combination of impairments significantly limiting her ability to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has a “severe” impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the claimant’s impairment or combination of impairments does not meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine whether the claimant has

sufficient “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the claim is denied. Id. The claimant has the burden of proving that she is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case of disability is established. The Commissioner then bears the burden of establishing that the claimant is not disabled, because she can perform other substantial gainful work available in the national economy. The determination of this issue comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS

In this case, at step one, the ALJ concluded that plaintiff has not engaged in any substantial gainful activity since the alleged onset date of disability.¹ [AR at 11.] At step two, the ALJ concluded that plaintiff has the severe impairments of “degenerative disc disease of the cervical and lumbar spines.” [AR at 12.] At step three, the ALJ concluded that plaintiff’s impairments do not meet or equal any of the impairments in the Listing. [AR at 14.] The ALJ further found that plaintiff retained the residual functional capacity (“RFC”)² to perform the “full range of medium work.”³ [Id.] At step four, after determining plaintiff’s RFC, the ALJ concluded that plaintiff is capable of performing her past work as a “home health aide and mental health nurse’s aide.” [AR at 18.] Accordingly, the ALJ found that plaintiff is not disabled. [Id.]

¹ The ALJ also found that although plaintiff had worked after the alleged disability onset date, based on the overall earnings records, that work did not rise to a level of substantial gainful activity from the alleged onset date through the date of the decision. [AR at 11.] However, the ALJ concluded that “[plaintiff’s] earnings over this period are evidence of her ability to perform work related tasks during the relevant time period.” [AR at 11-12.]

² RFC is what a claimant can still do despite existing exertional and nonexertional limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

³ Medium work is defined as work involving “lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.” 20 C.F.R. §§ 404.1567(c), 416.967(c).

V.

THE ALJ'S DECISION

Plaintiff contends that the ALJ failed to properly: (1) reject the opinion of treating physician Dr. James Hwang; (2) develop the record; (3) assess plaintiff's credibility; and (4) consider all significant and probative evidence. [Joint Stipulation ("JS") at 2.] As set forth below, the Court respectfully disagrees with plaintiff's position and affirms the ALJ's decision.

A. TREATING PHYSICIAN'S OPINION

Plaintiff contends that the ALJ improperly rejected the findings of her treating physician, Dr. James Hwang. [See JS at 3-7.] The ALJ rejected Dr. Hwang's more restrictive RFC of plaintiff "due to inconsistencies with [Dr. Hwang's] own findings, as well as other concurrent treating/examining sources' statements and clinical findings" [AR at 16-17.] Instead, the ALJ concurred with the state agency examiners' findings that plaintiff's "exertional and/or non-exertional limitations would limit her to medium level of exertion."⁴ [AR at 17.] A review of the record reveals that one of the reasons provided by the ALJ to reject Dr. Hwang's opinion -- that it was not supported by his own treatment notes -- is explicit and legitimate and supported by substantial evidence.

When an ALJ evaluates medical opinions, the case law and regulations require the ALJ to distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians);

⁴ On September 16, 2006, medical consultant Dr. R. B. Paxton, after reviewing plaintiff's medical records and to "allow for some discomfort," concluded that plaintiff has the capacity for a range of work at the medium exertional level with "occasional posturals." [AR at 150-53.] On November 2, 2006, medical consultant Dr. T. N. Do affirmed Dr. Paxton's "medium" RFC assessment of plaintiff. [See AR at 152; see also AR at 250-54.] Dr. Do reported that plaintiff could occasionally lift and/or carry fifty pounds, could frequently lift/carry twenty-five pounds, could stand, walk or sit for about six hours in an eight-hour work day, and had unlimited pushing and pulling abilities. [AR at 251.] Additionally, Dr. Do indicated that plaintiff's impairments did not affect her ability to occasionally climb ramps and/or stairs, balance, stoop, kneel, crouch or crawl. [AR at 252.] Furthermore, no manipulative, visual, communicative or environmental limitations were established. [AR at 252-53.]

1 and (3) those who neither examine nor treat the claimant (non-examining physicians). See 20
 2 C.F.R. §§ 404.1502, 404.1527, 416.927; see also Lester, 81 F.3d at 830. Generally, the opinions
 3 of treating physicians are given greater weight than those of other physicians, because treating
 4 physicians are employed to cure and therefore have a greater opportunity to know and observe
 5 the claimant. Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007); Smolen v. Chater, 80 F.3d 1273,
 6 1285 (9th Cir. 1996). Despite the presumption of special weight afforded to treating physicians'
 7 opinions, an ALJ is not bound to accept the opinion of a treating physician. However, the ALJ may
 8 only give less weight to a treating physician's opinion that conflicts with the medical evidence if the
 9 ALJ provides explicit and legitimate reasons for discounting the opinion. See Lester, 81 F.3d at
 10 830-31 (the opinion of a treating doctor, even if contradicted by another doctor, can only be
 11 rejected for specific and legitimate reasons that are supported by substantial evidence in the
 12 record).

13 The ALJ rejected Dr. Hwang's findings in part because his own treatment notes did not
 14 warrant the marked limitations he suggested. [AR at 16.] On June 3, 2008, Dr. Hwang completed
 15 a "Medical Opinion Re Ability To Do Work-Related Activities (Physical)" worksheet indicating that
 16 plaintiff's maximum ability to lift and carry on an occasional and frequent basis was less than ten
 17 pounds; plaintiff could sit, stand and walk for less than two hours in an eight-hour workday; and
 18 plaintiff could only occasionally twist, stoop, crouch, and climb stairs and ladders. [AR at 265-67.]
 19 He also suggested that plaintiff avoid concentrated exposure to elements such as extreme cold,
 20 extreme heat, wetness, humidity, noise, fumes and hazards.⁵ [AR at 267.] However, and as the
 21 ALJ noted, Dr. Hwang's treatment notes from February 2007 to June 2008 consistently indicated
 22 that plaintiff was in "no acute distress" and/or had "no guarding" behavior on many occasions. [AR
 23 at 16; see also AR at 300, 307, 335, 358, 363, 366, 371, 403, 406.] In fact, the record reveals that
 24 on the day Dr. Hwang issued his RFC opinion, plaintiff appeared in "no acute distress." [AR at

25
 26 ⁵ Although Dr. Hwang does not expressly suggest an exertional level for plaintiff, it appears
 27 he has assessed plaintiff at the "sedentary" level because, among other things, he opines that her
 28 maximum ability to lift and carry is less than ten pounds. See 20 C.F.R. §§ 404.1567(a),
 416.967(a) (sedentary work involves lifting no more than 10 pounds at a time and occasionally
 carrying articles like docket files, ledgers, and small tools).

335.] There is no indication in Dr. Hwang's notes from that visit that plaintiff was in any kind of pain. [See AR at 334-35.] The treatment notes also indicate that the reason for plaintiff's visit with Dr. Hwang that day was for a "medical examination for administrative purposes," and for a medication refill, not for treatment of an ailment. [AR at 335.] Furthermore, as the ALJ also noted, plaintiff was treated on an "as needed basis" for her complaints of neck/back pain, and most of her treatments with Dr. Hwang "were not related to her multi-level degenerative disc disease." [AR at 16; see also AR at 299-302, 354-56, 357-61, 362-64, 365-68, 380-83, 402-04, 405-07.] An ALJ may properly reject a treating physician's opinion that is inconsistent with his treatment notes. See C.F.R. §§ 404.1527(d)(4), 416.927(d)(4) (the more consistent an opinion is with the record as a whole, the more weight it will be given); see also Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 603 (9th Cir. 1999) (a medical report's inconsistency with the overall record constitutes a legitimate reason for discounting the opinion); Matney v. Sullivan, 981 F.2d 1016, 1020 (9th Cir. 1992) (inconsistencies in a physician's opinion represent a specific and legitimate reason for rejecting it); Weetman v. Sullivan, 877 F.2d 20, 23 (9th Cir. 1989) (a physician's opinion may be rejected where it is inconsistent with the physician's own treatment notes). The inconsistency between Dr. Hwang's treatment notes and his opinion regarding plaintiff's limitations was a specific and legitimate reason for rejecting his opinion. This reason alone suffices to reject Dr. Hwang's opinion. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (an ALJ need not accept a treating physician's opinions that are conclusory and brief, or unsupported by clinical findings or the physician's own treatment notes). Remand is not warranted on this basis.

B. DUTY TO DEVELOP THE RECORD

Plaintiff contends that the ALJ failed to properly develop the record, as plaintiff's condition had "worsened greatly" and the ALJ should have "secured updated treatment records and should have arranged for an updated orthopedic consultation." [See JS at 11-12.] The Court disagrees.

The ALJ has an affirmative "duty to fully and fairly develop the record and to assure that the claimant's interests are considered ... even when the claimant is represented by counsel."

1 Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003) (ellipsis in original) (quoting Brown v.
 2 Heckler, 713 F.2d 441, 443 (9th Cir. 1983)); see Tonapetyan, 242 F.3d at 1150. If evidence from
 3 a medical source is inadequate to determine if the claimant is disabled, an ALJ is required to
 4 recontact the medical source, including a treating physician, to determine if additional needed
 5 information is readily available. See 20 C.F.R. §§ 404.1512(e)(1), 416.912(e)(1); see also Webb
 6 v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (“[t]he ALJ’s duty to supplement a claimant’s record
 7 is triggered by ambiguous evidence [or] the ALJ’s own finding that the record is inadequate”). The
 8 responsibility to see that this duty is fulfilled belongs entirely to the ALJ; it is not part of the
 9 claimant’s burden. White v. Barnhart, 287 F.3d 903, 908 (10th Cir. 2001). The ALJ may
 10 “discharge this duty in several ways, including: subpoenaing the claimant’s physicians, submitting
 11 questions to the claimant’s physicians, continuing the hearing, or keeping the record open after
 12 the hearing to allow supplementation of the record.” Tonapetyan, 242 F.3d at 1150 (citing Tidwell
 13 v. Apfel, 161 F.3d 599, 602 (9th Cir. 1998)).

14 Here, the ALJ’s duty to further develop the record was not triggered. It appears plaintiff is
 15 asserting that the record is inadequate because her condition had worsened and the ALJ did not
 16 obtain updated medical records. [JS at 12.] However, the record indicates that plaintiff submitted
 17 medical records dated up to and including October 2008, just one month prior to the hearing. [See
 18 generally AR at 142-407.]

19 Plaintiff also asserts that she was “pending” neck surgery, which confirmed her condition
 20 was getting worse. [JS at 11-12.] Plaintiff testified, however, she would need surgery “eventually”
 21 but she had “no way to take care of that.” [AR at 51.] None of the medical records indicate that
 22 surgery was scheduled. [See generally AR at 142-407.] Thus, the record was not ambiguous or
 23 inadequate so as to trigger the ALJ’s duty to develop the record. Nevertheless, the ALJ kept the
 24 record open for plaintiff to supplement it with additional information. [AR at 62]; see Tonapetyan,
 25 242 F.3d at 1150 (an ALJ can discharge duty to fully and fairly develop the record by “keeping the
 26 record open after the hearing to allow supplementation of the record”); see also 42 U.S.C. §
 27 423(d)(5)(B). The ALJ specifically stated, “if you get additional records, by all means, get it to us,
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1 and I will take a look at it.” [AR at 62.] No additional evidence was submitted to the ALJ or to the
 2 Appeals Council for review. [See AR at 1-3.] Accordingly, remand on this basis is not warranted.

3 4 **C. PLAINTIFF’S CREDIBILITY**

5 Plaintiff contends that the ALJ’s “credibility analysis [as to plaintiff’s pain and limitations
 6 testimony] did not rest on substantial evidence in the record as a whole.” [JS at 13.] The Court
 7 disagrees.

8 Whenever an ALJ discredits a claimant’s testimony regarding subjective symptoms,
 9 including degree of pain and functional limitations, the ALJ must make explicit credibility findings.
 10 See Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); see also Dodrill v. Shalala, 12 F.3d
 11 915, 918 (9th Cir. 1993) (if the ALJ does not accept a claimant’s testimony, he must make specific
 12 findings rejecting it). The ALJ can reject a claimant’s allegations “only upon (1) finding evidence
 13 of malingering, or (2) expressing clear and convincing reasons for doing so.” Benton v. Barnhart,
 14 331 F.3d 1030, 1040 (9th Cir. 2003); see Lester, 81 F.3d at 834 (the ALJ must provide clear and
 15 convincing reasons for discrediting a claimant’s testimony as to severity of symptoms when there
 16 is medical evidence of an underlying impairment). The factors to be considered in weighing a
 17 claimant’s credibility include: (1) the claimant’s reputation for truthfulness; (2) inconsistencies
 18 either in the claimant’s testimony or between the claimant’s testimony and his conduct; (3) the
 19 claimant’s daily activities; (4) the claimant’s work record; and (5) testimony from physicians and
 20 third parties concerning the nature, severity, and effect of the symptoms of which the claimant
 21 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R.
 22 §§ 404.1529(c), 416.929(c). Absent evidence showing that a claimant is malingering, the ALJ
 23 must clearly identify evidence in the record undermining the claimant’s testimony to properly
 24 discredit his alleged limitations. See Dodrill, 12 F.3d at 918; see also Reddick v. Chater, 157 F.3d
 25 715, 722 (9th Cir. 1998) (“General findings are insufficient; rather, the ALJ must identify what
 26 testimony is not credible and what evidence undermines the claimant’s complaints.”) (citations

1 omitted). If properly supported, the ALJ's credibility determination is entitled to "great deference."
2 See Green v. Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

3 As the ALJ did not find that plaintiff was malingering, the ALJ was required to justify his
4 credibility determination with clear and convincing reasons. See Benton, 331 F.3d at 1040. In the
5 decision, the ALJ found that plaintiff's "medically determinable impairments could reasonably be
6 expected to cause the alleged symptoms; however, [plaintiff's] statements concerning the
7 intensity, persistence and limiting effects of these symptoms are partially credible to the extent
8 they are inconsistent with the above residual functional capacity assessment [citation]." [AR at
9 15.] The ALJ discounted plaintiff's subjective symptoms and alleged limitations because he found
10 that plaintiff's medical records were inconsistent with her subjective complaints and her complaints
11 of "chronic, severe neck/back pain ha[d] not adversely affected her ability to perform most tasks
12 including [those] work related." [AR at 15-17.] The Court has considered the ALJ's reasons for
13 discounting plaintiff's subjective testimony, and concludes that the ALJ has provided a clear and
14 convincing reason supported by substantial evidence for finding plaintiff's symptoms and
15 limitations incredible.

16 Plaintiff testified that she experiences pain every day. [AR at 25.] She is not able to stoop,
17 stand and sit for very long periods of time, and needs to shift positions every few minutes. [AR
18 at 15, 39.] She further testified that she experiences vertigo "quite often" which causes her to be
19 dizzy. [AR at 53.] Plaintiff stated that the longest period of time she experienced vertigo was for
20 "two or three days." [Id.] Despite plaintiff's alleged limitations, however, plaintiff was able to
21 perform tasks pertinent to her relevant work setting, and was in fact working during the relevant
22 time period. [See AR at 15, 22-23.] Thus, the ALJ properly found plaintiff incredible because her
23 activities exceeded her alleged limitations.

24 Plaintiff alleged a disability onset date of May 15, 2005. [AR at 64, 65, 120.] The ALJ
25 noted, and the record confirms, that plaintiff "testified that she stopped working full time in May
26 2005 due to severe neck/back pain," but plaintiff "continued to perform home health aide tasks for
27 pay on behalf of her mother [from 2001] until July 2007." [AR at 13-15; see also AR at 22-23.]
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1 Plaintiff testified that her primary responsibilities as an in-home aide to her mother included driving
2 her mother to various appointments and running errands such as going to the store to pick up
3 stamps on a daily basis. [See AR at 22-23.] Further, in an August 2006 psychological report,
4 plaintiff acknowledged that she “look[ed] after her [mother], cook[ed] her meals and [kept her]
5 house.” [AR at 209.] In that same report, the psychologist opined that “[t]his seemed to be
6 inconsistent with [plaintiff’s] inability to perform her job, particularly as it seemed that she was
7 doing the same type of work with her mother that she does in her employment.” [Id.] Thus, the
8 record supports the ALJ’s finding that plaintiff was able to perform work-related functions, and was
9 in fact working during the relevant time period. [AR at 15, 22-23.] As plaintiff engaged in daily
10 activities that involved skills that not only could be transferred to the workplace, but that were in
11 fact relevant to plaintiff’s past relevant work experience, these activities are sufficient for finding
12 plaintiff’s alleged limitations to be incredible. Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005);
13 see also See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (when a plaintiff’s daily activities
14 “involve many of the same physical tasks as a particular type of job,” those activities “may be
15 sufficient to discredit an allegation of disabling” symptoms). Because substantial evidence in the
16 record supports the ALJ’s finding, rejecting plaintiff’s credibility on this basis alone is sufficient to
17 discredit plaintiff’s testimony. See Tonapetyan, 242 F.3d at 1148 (“Even if we discount some of
18 the ALJ’s observations of [plaintiff’s] inconsistent statements and behavior . . . we are still left with
19 substantial evidence to support the ALJ’s credibility determination”). Giving the ALJ’s credibility
20 determination great deference, remand is not warranted on this claim.

21 22 **D. SIGNIFICANT AND PROBATIVE EVIDENCE**

23 Plaintiff asserts that the ALJ failed to consider significant and probative evidence,
24 specifically an MRI performed in April 2007 indicating that plaintiff’s condition was “worsening.”
25 [JS at 16; see also AR at 260-61.]

26 Although the ALJ “need not discuss *all* evidence presented to [him],” he “must explain why
27 ‘significant probative evidence has been rejected.’” Vincent v. Heckler, 739 F.2d 1393, 1394-95

(9th Cir. 1984) (quoting Cotter v. Harris, 642 F.2d 700, 706 (3rd Cir. 1981)) (emphasis in original). Contrary to plaintiff's assertion, the record indicates that the ALJ did not reject the April 2007 MRI, but in fact considered it in his disability determination. [See AR at 16.] Specifically, the ALJ found that the "April 2007 MRI of the lumbar and cervical spines had not changed from the earlier [2005] radiological reports denoting mild to moderate L5-S1 disc protrusion with no stenosis or foraminal narrowing." [Id.] He also found that the "cervical spine examination also had not changed from [earlier reports of] mild to moderate C5-6 disc herniation with mild to moderate bilateral foraminal narrowing." [Id.] Based in part on this finding, the ALJ concluded that plaintiff had the RFC to perform the full range of medium work. [AR at 14.] However, the ALJ does not cite to, nor can the Court find, a medical opinion that supports the ALJ's interpretation of the MRIs as showing that plaintiff's condition had "not changed" since the 2005 examinations. [See id.]

The 2005 MRI of plaintiff's lumbar spine apparently revealed only "mild to moderate degenerative disk disease at L5-S1, 2 mm disk bulge."⁶ [AR at 161.] The 2007 MRI indicated that plaintiff, at the same L5-S1 level, had "**moderate** disc desiccation," "**moderate** degenerative endplate edema involving both the inferior endplate of L5 and superior endplate of S1," "**3** mm central broad-based disc protrusion slightly indenting the anterior thecal sac," and "mild left neural foraminal narrowing." [AR at 260 (emphasis added).] The 2007 MRI further reported "mild desiccation" at the L3-4 and L4-5 levels [id.]; there was no report of these levels or any other levels in the 2005 lumbar spine MRI. [See generally AR at 161.]

The 2005 cervical spine MRI revealed degenerative disk disease at the C5-6 level. [AR at 161.] The 2007 MRI at the C5-6 level revealed, among other things, a "posterior osteophyte formation with a 2 mm retrolisthesis of C5 on C6 and a superimposed 5 mm central/left far lateral protrusion abutting the anterior cord," and "neural foramina [that] is mild to moderately narrowed bilaterally." [AR at 262.] The 2007 MRI of the cervical spine also reported on other levels, including C6-C7, which revealed "a 4 x 7 mm central disc herniation . . . with impingement on the

⁶ The 2005 lumbar and cervical spine MRIs were not included in the record, but were interpreted by Dr. Jennifer Chen in her February 1, 2006, evaluation of plaintiff. [AR at 161.]

1 transiting nerve roots and central canal stenosis." [AR at 262-63.] Thus, the 2007 MRIs were not
2 entirely consistent with the 2005 results, the ALJ's conclusion that the MRIs showed plaintiff's
3 condition had not changed is not supported by the evidence, and it was error for the ALJ to
4 interpret the evidence and substitute his opinion for that of a medical doctor. Gonzalez Perez v.
5 Sec'y of Health and Human Servs., 812 F.2d 747, 749 (1st Cir. 1987) ("The ALJ may not
6 substitute his own layman's opinion for the findings and opinion of a physician"); see also
7 Ferguson v. Schweiker, 765 F.2d 31, 37 (3rd Cir. 1985) (holding ALJ erred by "independently
8 reviewing and interpreting the laboratory reports" and thus "impermissibly substituted his own
9 judgment for that of a physician").

10 Nevertheless, this error was, at most, harmless. The April 2007 MRI was conducted during
11 a period when, according to plaintiff's testimony, she was continuing to work on a part-time basis.
12 This demonstrates her ability to work during the relevant time period. [AR at 22-23.] Further,
13 because the ALJ pointed to other objective evidence in the record in reaching his determination
14 that plaintiff is not disabled (including an October 2006 Complete Orthopedic Evaluation in which
15 examining physician Dr. Philip Z. Wirganowicz observed that plaintiff was "in no acute distress"
16 and was over-reactive throughout the examination, her "deep tendon reflexes [were] within normal
17 limits and [there were] no nerve tension signs," and she showed "[n]o muscular atrophy or
18 asymmetry" [AR at 15-16, 242, 244, 246]), "the ALJ's error, if any indeed existed, was
19 inconsequential to the ultimate nondisability determination," and therefore harmless. See Stout
20 v. Social Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006); see also Burch, 400 F.3d at 679 (citing
21 Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1991) ("A decision of the ALJ will not be reversed
22 for errors that are harmless.")); Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)
23 (an error is harmless if it is "clear from the record that an ALJ's error was 'inconsequential to the
24 ultimate nondisability determination.'"). Accordingly, remand is not warranted on this claim.

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VI.

CONCLUSION

IT IS HEREBY ORDERED that: 1. plaintiff's request for reversal, or in the alternative, remand, is **denied**; and 2. the decision of the Commissioner is **affirmed**.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.



DATED: September 21, 2010

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE